Petition

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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ZENOBIA E. HURLEY, *Petitioner,*

v.

COMMONWEALTH LAND TITLE INSURANCE COMPANY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Will the Petitioner, a married woman at the time of the event giving rise to this litigation, and a citizen of the community property State of New Mexico be deprived of her centuries old but ever renewed inheritance of "equality" as a spouse by a provision in a title insurance contract which reads:

> "This policy does not insure against loss or damage by reason of the following:
>
> 5. Community property, dower, curtesy, survivorship, or homestead rights, if any, of any spouse of the insured."

2. Is the Tenth Circuit Court of Appeals OPINION in this case, both in its language and ruling, a gender based discriminatory document and thus unconstitutional *and* does the judgment of Dismissal in the OPINION, stated to be based on the dilatory plea of premature filing of the Complaint which was never raised below, and which refuses to rule on the discriminatory "exception" in the Title Insurance Contract, a "due process" violation by the Court for the sake of preserving the status quo of inequality between the sexes established by the Title Insurance Company's "Exception" which was unconstitutionally preserved and endorsed by the United States District Court's dismissal with prejudice below? (The OPINION states its dilatory decision in these words: "Without finding it necessary to reach the various arguments advanced by the parties . . . it is the conclusion of this Court that the plaintiff's claims are simply not ripe for adjudication.")

3. Is the OPINION an ADVOCATE in behalf of the "common law" rule on husband and wife property ownership as distinguished from the "civil law" concept of community property which has always prevailed in New Mexico and is the dilatory dismissal a means of impeding the remedies available to the "spouse" under community prop-

erty laws applicable to a New Mexico husband and wife holding New Mexico land?

4. Is New Mexico's State Equal Rights Amendment Art. II Sec. 18, nullified or unconstitutionally impeded by the OPINION?

5. Is Petitioner and all "spouses" in New Mexico to be deprived of their "equality" protection under the Treaty of Guadalupe-Hidalgo, Kearney's Code for the Territory of New Mexico, Constitutional provisions, Statutes and numerous judicial decisions of New Mexico's Supreme Court, thru the actions of the Federal Judiciary refusing to grant relief in a justiciable case in controversy?

Does the Constitution of the United States afford protection to the Petitioner, a New Mexico "spouse" from the invasion by a Private Pennsylvania Company and the Federal Judiciary, of the State Constitutional and legal rights?

6. Does the OPINION violate Petitioner's 14th Amendment, U. S. Const. rights as "a citizen of" New Mexico by its failure to protect her rights, privileges, and immunities guaranteed her by Art. II Sec. 5, New Mexico Const.?

Art. II Sec. 5 states that said "rights" and "privileges" guaranteed to the people of New Mexico by the Treaty of Guadalupe-Hidalgo shall be preserved inviolate. Community property was one of said "rights" and "privileges".

7. Does the U. S. Const. Amendment X require the Federal Courts to follow and apply fully State rulings and remedies on private owned land?

8. Was Petitioner's right to trial by jury violated by the U. S. District Court's dismissal and by the 10th Circuit OPINION's fact findings?

Do the OPINION and Dismissal properly invoke this Court's superintending control over lower court for adequate relief to the Petitioner?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The two Orders by the U. S. District judge dismissing the Complaint and Amended Complaint with prejudice appear in the Appendix p. 7a. The two Memorandum Opinions also appear in the Appendix pp. 11a-14a.

The Judgment and Opinion by the 10th Circuit is in the Appendix. It is reported at 647 F.2d 1055 (1981).

JURISDICTION

The Opinion of the United States Court of Appeals for the Tenth Circuit, which affirmed the Summary Judgment against Petitioner, was entered on May 7, 1981. The Order denying Petitioner's Motion for Rehearing was entered on June 8, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

The following provisions of the Constitution of the United States and of the Constitution of the State of New Mexico are involved in this Petition:

1. Constitution of the United States, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Constitution of the United States, Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

3. Constitution of the United States, Amendment IX:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

4. Constitution of the United States, Amendment X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

5. Constitution of the United States, Amendment XIV:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6. Constitution of the State of New Mexico, Article II, § 5:

> The rights, privileges and immunities, civil, political and religious guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidelgo shall be preserved inviolate.

7. Constitution of the State of New Mexico, Article II, § 18:

> No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person. The effective date of this amendment shall be July 1, 1973. As amended November 7, 1962)

The following treaty and code provisions are involved in this Petition:

1. Treaty of Guadalupe Hidalgo (1848), Article VIII: Appears in Appendix page 29a.

2. Treaty of Guadalup Hidalgo, Article IX: Appears in Appendix page 29a.

3. Kearney Code of Laws (1846), Laws § 1:

> All laws heretofore in force in this territory, which are not repugnant to, or inconsistent with the constitution of the United States and the laws thereof, or the statute laws in force for the time being, shall be the rule of action and decision in this territory.

The following provisions of the New Mexico Statutes Annotated (1978 Compilation) are involved in this Petition:

1. § 40-2-1:

> Husband and wife contract toward each other obligations of mutual respect, fidelity and support.

2. § 40-2-2:

> Either husband or wife may enter into any engagement or transaction with the other, or with any other

person respecting property, which either might, if unmarried; subject, in transactions between themselves, to the general rules of common law which control the actions of persons occupying confidential relations with each other.

3. § 40-2-4:

All contracts for marriage settlements and contracts for separation must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved.

4. § 40-3-1:

The property rights of husband and wife are governed by this chapter unless there is a marriage settlement containing stipulations contrary thereto.

5. § 40-3-8:

A. "Separate property" means:

(1) property acquired by either spouse before marriage or after entry of a decree of dissolution of marriage;

(2) property acquired after entry of a decree entered pursuant to Section 40-4-3 NMSA 1978 unless the decree provides otherwise;

(3) property designated as separate property by a judgment or decree of any court having jurisdiction;

(4) property acquired by either spouse by gift, bequest, devise or descent.

(5) property designated as separate property by a written agreement between the spouses; and

(6) each spouse's undivided interest in property owned in whole or in part by the spouses as cotenants in joint tenancy or as cotenants in tenancy in common.

B. "Community property" means property acquired by either or both spouses during marriage which is not separate property.

C. "Property" includes the rents, issues and profits thereof.

6. § 40-3-12: NMSA (1978)

A. Property acquired during marriage by either husband or wife, or both, is presumed to be community property.

STATEMENT OF FACTS

There Are Two Major Divisions to This Petition

(A) There is a "discrimination" based on sex by the Title Company defendant which is a written "General Exception 5" in the policy in these words.

"This policy does not insure against loss or damage by reason of the following:

5. Community property, dower, curtesy, survivorship, or Homestead rights, if any, of any spouse of the insured."

"The 'discrimination' was applied specifically to Mrs. Hurley, the Petitioner herein, by the Title Company when she sued them on their title policy in the United States District Court for New Mexico, which was the state of the residency and of the marital community of which Lloyd Hurley was the husband and she was the wife.

The Policy "discriminatory" "General Exception" was based on sex because it "excepted" or "excluded" from coverage any "spouse" of the insured (App. 1).

Our first reason for requesting a Writ from this is simply the above "exclusion" which was used to defend against her suit.

Portions of Mrs. Hurley's Appellant briefs in 10th Circuit show a clear statement of the case below and its issues and is reproduced in the Appendix Exhibit 3.

The Title Company filed a Motion to Dismiss which the Court turned into a Summary Judgment which was granted with a Memorandum Opinion Appendix Exhibit 5 which fundamentally was on the basis of "exception 5" in the Policy.

There was an Amended Complaint filed which substantially followed the Complaint except in trying to be specific where the Court's Dismissal had indicated there was a need to do so. The District Court dismissed the Amended Complaint with prejudice. A memo decision accompanied the Dismissal with Prejudice and appears in App. 6. Both of Mrs. Hurley's Complaints alleged, as the basic wrong committed against her the following: The declarations of title in the policy were false because they read "Lloyd Hurley, a married man, as his sole and separate estate," when, in fact, it was not his sole and separate estate because of New Mexico's Community Property Law, N.M.S.A. 1978 Section 40-3-12, which establishes a presumption that all property acquired during marriage by either spouse is community property.

The above two fundamentals—that title was other than stated in the policy *and* that title was in the "community" because title was taken by Lloyd Hurley, a married man—were never disputed by the Title Company.

(B) The second division of this Petition concerns the above "superintending control." The basic document of this second part is the Tenth Circuit OPINION (fully capitalized herein to distinguish from the memo Opinions of the District Court and other cited Opinions).

Petitioner and Lloyd Hurley had been married in 1953. The matrimonial domicile on December 13, 1977 was the State of New Mexico, where they had resided for many years. On December 14, 1977, Lloyd Hurley filed for a divorce against the Petitioner in Bernalillo County, New Mexico District Court.

Tobruk is a parcel of New Mexico residential land. It would not qualify as a commercial venture. On December 13, 1977 Petitioner's husband bought this parcel and received a deed (App. 7) and gave a mortgage, both of which were insured by title policies issued by Defendant Title Company. The Policies show recitals of title as follows: "Lloyd A. Hurley, a married man, as his sole and

separate estate." The purchase price was $131,000, the mortgage was $130,000 to the First National Bank (App. 9), the $1,000 difference plus costs, plus premium on the mortgage insurance property were paid with community funds. The Petitioner, Zenobia Hurley, the wife of the insured, was not aware of the transaction. Defendant Title Company, knew of her existence, and that Lloyd A. Hurley had plans to file a divorce action against her. All parties, including the Title Company, knew that it was not Lloyd A. Hurley's "sole and separate estate" (App. 1).

The Deed, Mortgage and Title Policies described Lloyd A. Hurley as a "married man." The title policy cover the entire tract described, which would include Mrs. Hurley's share. The whole title was insured, not just the husband's contract. Plaintiff's Complaint App. 4, includes ads by Defendant in the ABA Journal, Apx. E. Also included is a Deposition statement by Title Company's agent that she knew: (1) that Mrs. Hurley should sign a Stipulation that her husband could take the property as his sole and separate estate and that she had not done so, and (2) that the policies were issued to Lloyd Hurley as his sole and separate estate when she knew that the property legally was not his sole and separate estate. (App. 8). Without a signed "settlement" by Petitioner, the property was community. Defendant had deed (App. 7) and mortgage recorded, and Owner's and Mortgage's Policies were issued. A debt was placed on the community in the amount of $130,000. App. p. —. The Title Company's refusal to pay, and defense when sued, were based on the application and enforcement of "Exception 5," which excluded coverage for the "community property interest of any spouse of the insured" and constitutes, fundamentally, the only defense raised in this litigation. The application of the "exception" is also the fundamental basis for the lower courts Dismissal with Prejudice of the Petitioner's Complainnt in this language, "This case does not come within this limited exception for the reason that the Defendant never intended that its actions benefit the Plaintiff as is evident from the *specific contract clause excluding*

any liability for damage by reason 'of community property rights of any spouse of the insured'" (italics supplied). App. Exhibit 6.

The specific wrongs insured against in the "Policy" were: "Commonwealth Land Title Insurance Company . . . insures . . . against loss or damage . . . sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;
2. Any defect in or lien or encumbrance on such title . . .
4. Unmarketability of such title." App. Exhibit 1

All three of the above wrongs occurred in this case and were the result of an intentional misstatement of title recitals in the Policy. App. Exhibit 1, Exhibit 8.

Petitioner filed this lawsuit in the United States District Court for the District of New Mexico against the Title Company on August 15, 1978. She discovered the real estate transactions of December 13, 1977, shortly thereafter and in the divorce proceedings filed against her on December 14, 1977. She was denied the right to show how this real estate transaction, secret as to her when it was made, affected the divorce proceedings. The New Mexico Statute of Limitations started to run against her shortly after December 13, 1977. Defendant did not raise the defense of premature filing of Petitioner's Complaint. It was not a basis of District Court Dismissal. App. Ex. 6. The Tenth Circuit raised it for the first time. In dismissing the case as a "breach of contract", the District Court said as follows, "It is hard to see how she is injured even if it is determined that the property is community property." The District Court immediately follows the above with this sentence, "Even if there were some injury, the Title Policy explicitly excludes loss or damage by reason of community property rights of any spouse of the insured." Following this statement, the District Court immediately concludes that, "As a matter of law, Plaintiff

is not entitled to recover for breach of contract) (see Appendix Exhibit 6).

The 10th Circuit did not directly rule on the Lower Court's Dismissal with Prejudice, but dismissed based on its own findings that the lawsuit had been prematurely filed.

The OPINION contained discriminatory language. Appendix page 20a. An analysis of the OPINION language is found in Appendix page 25a.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Title Policy "Exception 5" Is a Gender Based Discrimination On Its Face

Petitioner lists three groups who have denied her relief: (a) the Title Company defendant, (b) the U.S. District Court, and (c) the Tenth Circuit Court of Appeals OPINION. The first two are in substantial agreement on their reasons viz. the Title Company says that it did not owe Petitioner, wife and spouse any duty. This is based on the Title Company Exception 5, which discriminates against the wife as "spouse." (Policy "General Exception 5." App. 4a.) The U.S. District Court essentially agreed, by their dismissal, with prejudice. The Tenth Circuit made relief for Petitioner impossible in this lawsuit in violation of due process by its dismissal.

There are two fundamental facts:

(1) An Exception in the Title Insurance Policy, which says, "This policy does not insure against loss or damage by reason of the following: . . . Community property, dower, curtesy, survivorship, or homestead rights, if any, of any spouse of the insured."

(2) The language of the OPINION from the Tenth Circuit (OPINION is set out in App. 20a). An analysis of some of its discriminating wording also appears. App. 25a.

The above policy "Exception" is, on its face, a discrimination and the Petitioner herein is specifically pointed out therein as "spouse" (App. 4a).

The Tenth Circuit Opinion language is discriminatory based on sex in which the Petitioner herein is the object of the discriminating language. Thus, the Policy Exception and the OPINION language have one and the same person in view, this Petitioner, Mrs. Hurley.

The Petitioner believes the OPINION's language to be clear evidence of a biased viewpoint, i.e. contra-sexual equality, but believes additional factors are also present which support this belief: (1) the Dismissal failed to give any relief, (2) there was no reason why the OPINION would ever discuss and compare husband and wife since the decision was based on prematurity, (3) the defense of "prematurity" was strictly a Tenth Circuit solution and was not raised below, (4) the Tenth Circuit OPINION placed obstacles in the way of another suit and in the proof the OPINION permitted on damages, (5) it refuses to say whether the Complaint stated a cause of action and leaves that uncertain for the future, (6) prematurity is a dilatory plea and the OPINION creates a Statute of Limitations problem in the future, (7) no legal analysis or citation accompanies the OPINION.

Although the Exception is discriminatory on its face, we submit that the legal principles used by the District Court was an erroneous and outmoded principle totally inapplicable to the Petitioner's cause of action against the Title Company even apart from the "discrimination" aspect of the "Exception."

The basic wrong is that title to the estate is not as described in Schedule A. Therefore, there is a defect in the Title which fulfills a requisite for that cause of action known as Slander of Title. More in particular, it is a direct violation of the promises made in the Policy itself.

There is a controlling and determinative statutory provision in New Mexico's community property law which covers both the reason why the false recitals in the policy are false and why the "Exception 5" is a discrimination forbidden by New Mexico law. This section is 40-3-12, which

reads, "Property acquired during marriage by either husband or wife, or both, is presumed to be community property."

There is one other very pertinent New Mexico community property statutory provision (40-2-4) which reads, "All contracts for marriage settlements and contracts for separation, must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed and acknowledged or proved." Its application is material to the factual situation because it explains why the Defendant's company knew that they were stating title recitals which were false.

The State of New Mexico, in 1973, passed a Constitutional Amendment which expressly prohibits discrimination on the basis of sex, Vol. I N.M.S.A. 1978 Article II Section 18. The Amendment is as follows: "Equality of rights under law shall not be denied on account of the sex of any person."

FEDERAL COURTS ARE BOUND TO APPLY STATE LAWS AND STATE CONSTITUTIONAL PROVISIONS AND TREATIES OF THE UNITED STATES OF AMERICA TO APPLICABLE CASES.

The State of New Mexico became a part of the United States as a territory pursuant to the Treaty of Guadalupe-Hidalgo, 1848. Article VIII and Article IX of the Treaty cover personal and property rights of those persons living in New Mexico before it became a territory of the United States, N.M.S.A. 1978, Vol. I, pp. 73-86.

The State of New Mexico expressly incorporates the Treaty into its Constitution as follows N.M.S.A. 1978, Vol. I, Article II § 5, p. 5, "The rights, privileges and mimunities, civil, political and religious guaranteed to the people of New Mevico by the Treaty of Guadalupe-Hidalgo shall be preserved inviolate." The Treaty has been discussed in numerous cases, some of which are referred to in the Land *Co. vs. Suazo,* 105 p. 2, 744 44 N.M. 547 (1940). The fact

that the community property system came from Mexico, and has always been in effect in New Mexico, has never been disputed. Strong vs. Eakin, 11 N.M. 107, 66 p. 539 (1901). In a practical way, the defendant Title Company is disputing its obligation to contract over New Mexico land according to the property system approved by the Treaty and expressed in N.M. Constitution, Article II, Section 5.

The Treaty created binding obligations upon two governments which would be protected in the Federal courts. Jurisdiction granted by U.S.C. 28 § 1331 expressly includes civil actions arising under "treaties of the United States."

In a Treaty breaking defense, the Title Company claims the right by contract to deprive Petitioner of her community property right to have her share of New Mexico *land* covered by a Title Policy which insured *her* share of that land.

The lower court opinions endorse the "common law" husband-wife prospect concept by saying that a Pennsylvania corporation has the right to eliminate their duty to a community property wife in the State of New Mexico. The "common law" concept would have enabled Lloyd Hurley to have taken the property as his own pursuant to the title recitals used. This substitution of common law for civil law was accomplished by "Exception 5" in the Policy and nullified New Mexico's right to legislate for its own landand for its own married citizens. Arndt vs. Griggs, 134 U.S. 316, 12 S.Ct. 557, 33 L.Ed. 918 (1890).

Article II, Section 5 of New Mexico's Constitution, in referring to "rights, privileges, and immunities, civil, political and religious", certainly includes a special manner of property holding for husband and wife. This provision closes with the mandate "shall be preserved inviolate." Since the Treaty, which is the claimed source of the rights, privileges and immunities, was an obligation of the United States for the benefit of the "people of New Mexico," then the United States would have the obligation to prevent a Corporation from Pennsylvania from nullifying the right.

The United States should protect the rights that come with the territories annexed, Barnett vs. Barnett, 50 p. 337, 9 N.M. 205, 212 (1897). De Funiak, Principles of Community Property, Vol. I (1943), p. 102, gives an explanation of the Treaty of Guadalupe-Hidalgo and the Gadsden Purchase as forming the territorial background for the introduction of community property concepts into what is now the State of New Mexico. Five states resulted from the Treaty of Guadalupe-Hidalgo and the Gadsden Purchase, including Utah. De Funiak states, "of these five states only Utah failed to retain the community system which had been in effect in that region . . . ." New Mexico is the only state following the community system in the Tenth Circuit.

The language and result in the Tenth Circuit indicate a viewpoint influenced by "common law" concepts. New Mexico's entire background before and after 1848 is an unbroken adherence to the civil law concept. The said concept is more pro-wife than the common law, obviously.

The existence and nature of civil law expressed in community property concepts appears from the earliest recorded cases in New Mexico. A quotation from Chaves vs. McKnight, 1 N.M. 147, 151 (1857) voices the foregoing attitude in these words, "The civil law is commended to our highest admiration by the humane regard which it so justly, and carefully maintains on the behalf of women. In pursuance of its wise and just policy towards the sex, it throws its panoply around the married woman to protect her against injustice, tyranny, and aggression upon her rights on the part of her husband."

Kearney's Code, adopted September 22, 1846, by the Territorial Legislature of New Mexico, provided that: "All laws heretofore in force in this territory, which are not repugnant to or inconsistent with the Constitution of the United States, and the laws thereof, or the statute laws in force for the time being, shall be the rule of action and decision in this Territory." The community interest of the husband and wife is likened to a partnership in all property acquired by either during the marriage, whether by pur-

chase or their individual or joint labor and industry. Schmidt's Civil Law of Spain and Mexico, c. 4, p. 12; Ballinger on Community Property, §§ 5, 15, 16, 17, 18, 19." Kearney's Code is found in N.M.S.A. 1978 Vol. I, Territorial Laws and Treaties, p. 1-72.

The present community property law, 40-3-12, supra, contains the identical presumption that was stated by the New Mexico Circuit Court in 1903 in Brown vs. Lockhart, 12 NM 10, 20, 71 Pac 1086, 1088 (1903): "The law creates a presumption that property acquired during coverture is community property, and is subject to the payment of community depts."

In Hurley vs. Hurley, 94 NM 461, 615 P2 256 (1980) the Supreme Court of New Mexico decided that ownership of the realty in question was "community" based on the above quoted never-varying presumption in New Mexico law. In 1973, when the "equal rights" based on sex was added to the particular section of New Mexico's Constitution, the original all-inclusive "equal protection" clause was retained, supra. New Mexico has two equal protection clauses in Article II, Section 18. Community property laws of the state (40-3-12), supra, require recognition by third parties including the Defendant title company:

Rodriguez vs. Ranch Co. 17 NM 246, 134 P 228 (1912)
Beals vs. Ares 25 NM 459, 185 P 780 (1919)
Adams vs. Blumenshine 27 NM 643, 204 P 66, 20 A.L.R. 369 (1922)
Sanchez vs. Scott 85 NM 695, 516 P2 666 (1973)
Matter of Estate of Shadden 93 NM 274, 599 P2 1071 (1979)

Failure to give a wife "notice" that her rights are being affected has been held unconstitutional. Rodriguez vs. Ranch Co., supra, held that such failure "is in conflict with those provisions of our state Constitution as well as the Constitution of the United States, which provide that no person shall be deprived of life, liberty or property except by due process of law."

Barnett vs. Barnett, supra, p. 213, in 1897 reviews the law of nations on sovereignty as applied to New Mexico and discusses the automatic transfer to the Territorial government of New Mexico of the civil law on community property. It concludes that " 'under the Spanish and Mexican law, property acquired by—the husband and wife during the marriage—belonged to the community' " and also states: "that any change in the Spanish law has been made, cannot be seriously pretended." P. 213.

THE DISMISSALS BY THE UNITED STATES DISTRICT COURT AND THE TENTH CIRCUIT HEREIN ARE IN CONFLICT WITH RECENT DECISIONS BY THE SUPREME COURT OF THE UNITED STATES ON GENDER-BASED DENIALS OF "EQUAL RIGHTS."

Two recent cases from this Court support Petitioner's position. Wengler vs. Drugists Mutual Insurance Company et al., 446 US 142, 64 L Ed 2d 107, 100 S Ct 1540, held violative of "equal protection," under the 14th Amendment a gender-based distinction in the Missouri Compensation Act governing death benefits for widows and widowers. The Opinion says "it is apparent that the statute discriminates against both men and women." A note in Wengler, supra, p. 113 of 64 L Ed 2d, says that "recent decisions in three states have held unconstitutional workers' compensation statutes with presumptions of dependency identical to that at issue in this case," thus indicating that judicial relief is the most effective in the field of discrimination. The discrimination in our case came from a private insurance company. The equation is between a private discrimination and a public discrimination (Wengler, supra). In distinction from the Wengler case, we need not discuss whether the title insurance company's discriminatory "Exception 5" serves important governmental objectives, since New Mexico's Equal Rates Amendment, Article II, Section 18, protects against discrimination based on sex from whatever source, governmental or otherwise. It should protect against a discrimination imposed

by a private title company (Article II, Section 18, New Mexico Constitution).

Another recent case, Kirchberg vs. Feenstra, No. 79-1388, decided March 23, 1981 by this Court, 101 S.Ct. 1195, 67 L.Ed2d 22, is close to our case because it involved a community property law of Louisiana which gave to the "husband exclusive control over the disposition of community property." This is referred to as the "head and master concept." The Opinion states, "By granting this husband exclusive control over the disposition of community property, Article 2404 clearly embodies the type of express gender-based discrimination that we have found unconstitutional absent a showing that the classification is tailored to further an important governmental interest."

DISCRIMINATION BASED ON SEX CONFLICTS WITH U.S. SUPREME COURT CASES, TENTH CIRCUIT CASES, AND OTHER FEDERAL AND STATE CASES.

Our present position on discrimination is supported by Federal and state cases which declare unconstitutional prior common law rulings denying a wife the right to recover for loss of her husband's consorrium when the husband had such a right. For that reason, the Tenth Circuit in Duncan v. General Motors, 499 F2 835 (1974) reversed the U.S.D.C. of Oklahoma. It recognized Oklahoma common law principles in prior cases to the contrary but said, "These cases by no means preclude a different decision today." In referring to prior Tenth Circuit cases from Oklahoma, the Opinion said they were "like the majority of decisions in other jurisdictions based on state substantive law. However, where state law is challenged for Federal Constitutional reasons, as it is here, Federal law governs and not state substantive law." The Tenth Circuit Opinion concluded in these sensitive words, "The intangible segments of the elements comprising the cause of action for loss of consortium are equally precious to both husband and wife. Both have equal rights in the marriage relations and both should receive equal protection under

the law. We find that no legitimate basis exists for the classification present in the instant case, and we conclude that denial of the right to sue for loss of consortium is a violation of the wife's right to equal protection of the law under the 14th Amendment to the Constitution."

In Sharon Frontiero v. Elliott Richardson 411 U.S. 677, 36 L.Ed2d 583, 93 S Ct 1764 (1973), this Court held that differences in treatment between servicewomen and servicemen under a Federal statute created an unconstitutional discrimination against servicewomen. The Constitutional provision violated was the 5th Amendment "due process clause" of the Federal Constitution. The "invidious classification" was the statuatory requisite that "a female member is required to demonstrate her spouse's dependency," while no such burden is imposed upon male members. There was a second inequality in the act. Since the foregoing arose under Federal statutes, the 14th Amendment with its language of "No state shall" was not the Constitutional provision applied. Rather the "due process" clause of the 5th Amendment was cited. The foregoing majority Opinion states, "There can be no doubt that our nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which in practical effect put women not on a pedestal but in a cage." Later, the Opinion states at 36 L Ed 2d 591, "throughout much of the 19th century, the position of women in our society was, in many respects, comparable to blacks under the pre-Civil War slave codes." The Court goes on to give instances of "discrimination" and although noticing that marked improvement had taken place, the Court recognized the present existence of "more subtle discrimination" in various fields. Cases, studies, books, and reports are cited in support of the existence of "discrimination" based on sex.

Since Frontiero vs. Richardson supra reverses a three-judge court, it follows that "due process" was applied within the Federal Judiciary. Justice Douglas pointed out

the application of the 5th Amendment in a dissent in Richardson vs. Belcher, 404 US 78, 30 L Ed 2d 231, 92 S Ct 254. The majority opinion was not based on opposition to the quote, which is, "It is, in my view, violative of the Federal government's obligation under the 5th Amendment Due Process Clause to guarantee to all citizens equal protection of the laws. Bolinger vs. Sharpe, 347 U.S. 497, 98 L Ed 84, 74 S Ct 693."

Frontiero vs. Richardson, supra, is thus doubly significant to Petitioner herein because "she" is described in Tenth Circuit language indicating that the "long and unfortunate history of sex discrimination" has not ended. Petitioner is not opening up a new field of discrimination. The Civil Rights Act of 1964, Title VII, and the Equal Pay Act of 1963 specifically prohibit discrimination based on sex in the areas covered by the Acts. As stated in Frontiero, supra, they show a governmental regulation to relieve an existing problem of discrimination. No one is exempt. A Congressional Act itself can provide the discrimination. As in Frontiero vs. Richardson, supra, and also Mortiz vs. Comm. Int. Rev. (CCA 10th) (1977), 469 F2 466. See also Reed vs. Reed, 404 US 71, 30 L Ed 2d 225, 92 S Ct 251 (1971), where a state statute was held discriminatory. In Frontiero vs. Richardson, supra, the Act of Congress was a violation of equal protection, but the constitutional provision by which the servicewoman was provided relief was the "due process" clause of the 5th Amendment. The instant case would satisfy both the majority and concurring opinion in Reed, supra, because the law of the State of New Mexico on ownership of property forbids "discrimination" based on sex. What we have in the instant case is the Federal Court's nullifying a state crimination, as in Frontiero vs. Richardson, supra, and antidiscriminatory law. N.M.S.A. 40-3-12 supra. The "more subtle discrimination" denounced in Frontiero vs. Richardson is evident in Mrs. Hurley's case. The Tenth Circuit Opinion does not deny that New Mexico has a community property law and a constitutional amendment prohibiting unequal treatment based on sex, but the OPINION relegates

them to a non-decisive role by placing barriers in the way of realizing "equality." "Starting all over again" is one example. Another illustration of putting women "in a cage" is to recognize her only as "Dr. Hurley's" wife and then falsely say she is like a "guarantor on a note which is not yet due." She is denominated as a lawsuit-minded person who could not wait for the proper time to file a claim of uncertain value anyway. The language of the Opinion indicates that she has to be demeaned in order to fit the decisions. See App. Ex. 7 for an analysis of discriminatory language in the OPINION.

Hurdles obstructing the realization of constitutional rights by altering the source of the discriminatory force, like using private parties rather than state agencies, have been overcome. Gilmore vs. City of Mobile, 417 US 556, 41 F Ed 2d 304, 94 S Ct 2416; James vs. Mayer, 392 US 409, F Ed 2d 88, S Ct 2186. Hurdles placed by lower federal courts can be overcome. The discriminatory language in the Tenth Circuit Opinion clearly indicates the judicial attitude which approaches this case. It would not be expected that such an attitude would produce a result that would benefit the "spouse," and it did not. It is OPINION language which removes any doubt that women from New Mexico, with their own ERA, would have that equality recognized and applied herein. New Mexico Constitution, Article II, Section 18.

There is agreement between New Mexico and the United States on the question of sex discrimination. Therefore, state constitutional protection is a Federal constitutional right. Forsyth vs. City of Hammond, 166 US 506, states, "The construction by the courts of a state of its constitution and statutes is, as a general rule, binding on the federal courts. We may think that the Supreme Court of a state has misconstrued its Constitution or its statutes but we are not at liberty to therefore set aside its judgments . . . and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States, for it is a question that relates to the

internal constitution of the body politic of the state," citing cases. The above quote was from Claiborne County vs. Brooks, 111 US 316, 40 S Ct 489, 28 L.Ed. 470 (1884).

In Arndt vs. Griggs, supra at p. 559, in referring to Nebraska, the Court says, "It has control over property within its limits and the condition of ownership of real estate therein . . . and no proceeding which it provides can be declared invalid unless in conflict with some special inhibitions of the Constitution or against natural justice. So it has been held repeatedly that the procedure established by the state in this respect is *binding* upon the federal courts," citing and quoting from U.S. vs. Fox, 94 US 315, and other cases, underlining supplied.

The thought expressed in the concurring opinion of Frontiero vs. Richardson, supra, that in certain other instances this Court should await the decision of the State or the national ERA, could have no application here, since New Mexico has already spoken through its community property laws (40-3-12), supra, and Constitutional Amendments, Article II, Section 5 and Article II, Section 18.

A failure to apply New Mexico and Constitutional protection in the federal courts judicially created the inequality based on sex which became the "invidious classification." The wording of New Mexico's Constitutional Equal Rights Amendment starts with "no person shall be deprived," thus indicating that it is the "person" who is being protected from whatever forces should move against her to violate the rights thus stated. "The purpose of the Community Property Act of 1973 is to comply with the provisions of Section 18 of Article II of the Constitution of New Mexico, as it was amended in 1972 and became effective on July 1, 1973, by making the provisions of the community property law of New Mexico apply equally to all persons regardless of sex."

In an Oklahoma case, the Tenth Circuit has stricken as unconstitutional a gender-based classification of long stand-

ing of the "common law" of Oklahoma. In Geraldine Duncan vs. General Motors, 499 F2 835 (1974) (10th CCA), the Court quoted from and followed Frontiero vs. Richardson, supra, asserting that a former "test" that "a sex-based discriminatory rule of state law would be sustained unless it was patently arbitrary and was not rationally related to a legitimate governmental interest", "is *no longer applicable*," underlining supplied, because of Frontiero vs. Richardson, supra. The Tenth Circuit went on to say "under *either test*, we believe the instant classification violates the Fourteenth Amendment's equal protection clause." Appellees offer no justification, nor is any apparent, to support such inequal treatment. Thus, it fails to meet both the criteria of the traditional rational basis test and the demands of strict judicial scrutiny." As a fundamental basis for its decision, Duncan vs. General Motors, supra, says in referring to husband and wife: "Both have equal rights in the marriage relation, and both should receive equal protection under the law." Compare the that with the language used to describe Mrs. Hurley and "Dr. Hurley" in the 1981 OPINION. A comparison between Geraldine Duncan's case and Mrs. Hurley's would indicate that Mrs. Hurley had a much stronger equal rights State behind her. Mrs. Duncan had to go against Oklahoma common law doctrine of long standing, whereas Mrs. Hurley had the entire support of all law and constitutional provisions from her State of New Mexico. The unconstitutional common law principle of Oklahoma only barred one item of damages, i.e. loss of consortium. The right to sue a tort feaser remained, as did all other elements of damages like pain and suffering, etc. Mrs. Hurley is denied even the right to sue the title company at all by the simple device of an "exception" in the policy. Duncan supra mentions that the Oklahoma legislature had remedied the inequality on loss of consortium. However, the decision was on a U.S. Constitutional basis. The New Mexico legislature had always granted to a "wife" co-ownership in property acquired during marriage (40-3-12 supra) and had *prohibited any departure* except by a document in

writing signed, executed and acknowledged or proved in like manner as a grant of land (40-2-4).

Duncan v. General Motors supra applied a constitutional remedy to a tort case against a private party involving discrimination based on sex. The case was "considered in a constitutional context," thus prohibiting any evasion of equality merely because the "discrimination" was raised by a private party as a means of minimizing damages for a tort. Mrs. Hurley's "lack of privity" asserted by the District Court as a common law defense compares with the common law denial of consortium in Duncan supra.

"PREMATURITY" RULING AND JUDGMENT OF DISMISSAL BY 10TH CCA IS A VIOLATION OF DUE PROCESS.

The lack of case support for the "prematurity" ruling; the fact that it was not raised below nor in the appellate briefs; the delay in starting again; the probable forfeiture from the Statute of Limitations; the conflict with the long-established meaning of accrual, both common law and statutory; reduction of Mrs. Hurley to the status of a depersonalized entity by the wording of OPINION; all indicated violation of "due process," 5th Amendment, U.S. Constitution, in the OPINION itself.

The OPINION did in effect withhold a due process right from the Appellant because it did not decide the issues that were presented. The dismissal based on prematurity was a refusal to determine a justiciable case in controversy by a citizen of the United States. County of Allegheny vs. Frank Mashuda Company 360 U.S. 107, 3 L Ed 2d 1163, 79 S Ct 1060 supports this contention. County of Allegheny supra was also a land case applied in a state eminent domain case. This Court discussed the "doctrine of abstension" and said it "is an extraordinary and narrow exception to the duty of a district court to adjudicate a controversy properly before it." The Tenth Circuit would not consider Mrs. Hurley's case. All rulings and refusals to rule, including the language discriminating against the Plaintiff, indicate that the Tenth Circuit ruling is in the nature of an unconstitu-

tional "abstention." County of Allegheny vs. Mashuda Company says, "Respondents have consumed considerable time and expense in pursuing their claim that the property has been unlawfully taken. To order them out of the federal court would accomplish nothing except to require still another lawsuit, with added delay and expense for all parties. This would be a particular hardship for the Respondents, who, besides incurring the added expense, would also suffer a further prolonged unlawful denial of the possession of their property if ultimately they prevail against the County and its lessee. It exacts a severe penalty from citizens for their attempt to exercise rights of access to the federal courts granted them by Congress, to deny them 'that promptness of decision which in all judicial actions is one of the elements of justice.'" Forsyth vs. City of Hammond, 166 U.S. 506, 513, 17 S Ct 665, 41 L Ed 1095.

Kelly vs. Upshaw, Cal. (1952) 246 P 2d 23, 27 states that prematurity "is in the nature of a dilatory plea not favored in the law and that such defense must be seasonably urged in the trial court or it is waived." Prematurity was never pleaded as a defense, nor was the doctrine of prematurity raised on Appeal, nor the basis of the Judgment below. Lutscher vs. Knight (1910), 277 U.S. 257, 54 L Ed 757, 30 S Ct 257 holds that to raise an issue initially on Appeal "was equivalent to condemning them without affording them an opportunity to be heard," and was "substantially to deny them their day in court." 54 L Ed 761. Also County of Allegheny vs. Frank Mashuda supra.

THE LACK OF PRIVITY THEORY APPLIED BY THE UNITED STATES DISTRICT COURT AS A BASIS FOR ITS DISMISSAL WITH PREJUDICE OF PETITIONER'S COMPLAINT IS UNCONSTITUTIONAL AS APPLIED TO THIS CASE, AS BEING IN CONFLICT WITH THE EQUAL PROTECTION OF THE LAWS.

The injustice of a ruling may be judged by its effect. The clear effect of the ruling by the United States Court is to allow a private insurance company to discriminate against women by issuing a policy that the spouse's community

property interest would be an "exception" to the coverage otherwise accorded in the policy as to the land and ownership of the same that was the subject matter of the policy. Constitutional provisions, and in particular Article 2, Section 18 of the New Mexico Constitution, which says that no person shall be deprived of equal rights because of sex, must be applied in preference to a principle of common law or statute. This case does not involve issues of the first impression—this case involves issues which in New Mexico law had been settled here ever since its existence. The United States District Court opinions, which treat the matter as if the Court were free to apply other doctrines and disregard constitutional provisions against discrimination, are a preference for a principle of law to a constitutional requirement. Even the principle of law was never applicable to the facts involved in this case and represented outmoded legal thinking unduly protective of an exaggerated "right to contract" over the duties of social responsibility. Even if the rule of law sought to be invoked, i.e., priority of contract defining one's duty to the public still had any following judicially, the action of the Title Company in advertising in the American Bar Association Journal, App. 10a, designed to attract the general public, would spell out their recognition of their assumed duties to the public, which never excluded "spouses." The Tenth Circuit, by refusing to exercise its authority over the U. S. District Court by postponing any decision on the issues below, through its ruling on "prematurity," is making Mrs. Hurley's "equal rights," Article, Section 18, incapable of present realization, and probably incapable of ever being realized. The opinion itself then became a "discrimination" in violation of "due process," 5th Amendment.

FEDERAL COURTS WOULD ALLOW A DISCRIMINATORY TITLE INSURANCE POLICY TO EXTEND INTO THE WHOLE FIELD OF TORT LAW, AND DISCRIMINATE AGAINST A "SPOUSE" IN THAT FIELD, ALSO.

Petitioner pled several tort counts against the defendant. The lower court ruled that the title policy excep-

tion insulated the title company from tort liability in addition to barring any contract claim. This exception, then, is "discriminatory," based on sex as applied to torts, which means that the title company can define for itself the limit of its legal duties. This raises the title company to the status of a judicial or legislative body. There is only one class to which the tort immunity was applied by defendant; that is, spouses of the insureds. All others retained their torts right with corresponding duties to them by the title company (see Policy App. 1a). This is truly discriminatory, with the power of the title company to name the persons it wants to discriminate against. At this point, the practical value to litigants of the constitutional protection of equal rights (Article 2, Section 18, New Mexico Constitution) becomes evident. The rules developed by the United States Supreme Court on race restrictions in covenant is applicable (James vs. Mayer, 392 U.S. 409, 30 L Ed 2d 1189, 88 S Ct 2186). The "Exception . . 5," which establishes discrimination in tort and contract, if stricken as unconstitutional, means citizens in New Mexico are free to enjoy the equality they have always had. This means that your petitioner, Mrs. Hurley, "spouse", would then be entitled to the same rights and remedies, privileges and immunities as everyone else. She would be lifted from the discriminated class because the whole discriminated class would have been freed.

The fact that we have a private contract rather than the action of a state as the "discrimination" has not been a judicial basis for allowing a discrimination. The United States vs. Price, 383 US 787, 801, 16 LED 2nd, 267, 276, 86th Supreme Court, SCT 1152 says, "we are not at liberty to seek ingenious analytical instruments, Ibid, to carve from Section 1982 an exception for private contract—even though its application to such conduct in the present context is without established precedent. As the Attorney General of the United States said in the oral argument of this case, "the fact that the statute lay partially dormant for many years cannot be held to diminish its force today."

IN ADDITION TO BEING A VIOLATION OF DUE PROCESS THE OPINION RULING OF PREMATURITY CONFLICTS WITH NEW MEXICO LAW AND THE UNIVERSAL MEANING OF ACCRUAL OF A CAUSE OF ACTION.

The Dismissal For Prematurity Would Probably Work A Forfeiture Of Petitioner Cause Of Action Because Of New Mexico's Statute Of Limitations.

The OPINION destroys the universal meaning of "accrual of a cause of action." Jewell vs. Price (North Carolina), 1965, 264 NC 459, 142 SE 2d. Strimling vs. Union Indemnity Co. (Minnesota), 215 NW 2d 67, 1927. Ladas vs. Psiharis et al., 216 NW 458, 241 (Michigan), 101, 1927.

Hodge vs. Service Machine Co. (CCA 6th), 1971, 438 F2 347 says, "In a Federal diversity action to recover under a state-created right, jurisdiction being based solely on diversity and citizenship of the parties, the "State's" Statute of Limitations applies." New Mexico Limitation Act, 37-1-1 supra, uses the word "accrue." The OPINION would affect a forfeiture by delaying the filing of a cause of action until its limiting and erroneous rule about damages is met, Jewell vs. Price supra. It is almost four years since the issuance of the Title Policy and therefore the accrual of this cause of action. New Mexico Limitations Statute of four years, 37-1-3 supra would seem to apply. Baker vs. F & F Investment Co., (7th CCA) 1970, 420 F2 1191. Poffenberger vs. Risser, 421 A2 90, (Maryland) 1980. Nardone vs. Reynolds, 333 SO2 25 (Florida), 1976. Sullivan vs. Stout, 120 NJL 304, 199 A1, which dealt with the liability for a mistake in certificate of title, the Court said, "It is settled that a right of action against an attorney for making a false or incorrect report of a title accrues (in the absence of fraud) when the result of the examination of title is reported and the Statute of Limitations then begins to run, not when the error is discovered or consequential damage results. Also Lattin vs. Gillet, 95 (Cal.) 317, 30 P 545, 29 Am. State Reports 115.

Unexcelled Chemical Corp. vs. United States, 345 U.S. 59, 97 L.ed. 821, 73 S Ct 580, we find the following: "A cause

of action is created when there is a breach of duty owed Plaintiff, and it is that breach of duty in honest discovery that normally is controlling." This quote can be used in two ways in our case. First of all, the words "a cause of action is created" means that there could be a lawsuit when the breach of duty occurred; therefore, the very language negatives the Tenth Circuit Opinion of prematurity. A cause of action arose as of December 13, 1977. The Policy with false title recitals immediately caused the community debt and, therefore, created not only a cause of action, but was the immediate cause of a situation which falls within the term "damages." This quote from the Supreme Court case supra speaks of a breach of duty occurring and creates a cause of action even if the Plaintiff did not discover it until some subsequent time. Therefore, in accordance with the Supreme Court OPINION, the cause of action arose when the Defendant acted erroneously and intentionally, with statements of title recitals which were false.

The Tenth Circuit Opinion elevates damages to an unwarranted position by making the cause of action depend upon damages. This effects a whitewash of the fraud and the intentional false recitals of title. The term "accrual of a cause of action" takes on an entirely different aspect under such a ruling. Damages are always related to the particular breach. The OPINION substitutes a false definition of damages for breach of duty as the accrual of a cause of action, but even then, it is in conflict with New Mexico law and a recent decision by the New Mexico Supreme Court in Hartman & Williams et al. vs. U.S. Life and Title Company, decided on June 29, 1981. —— NM ——, 630 P2 758 decides contra to the Tenth Circuit OPINION, as both *time when* the Complaint could or should be filed and also *what* are damages within the scope of the Title Policy breach. The New Mexico Supreme Court in Hartman supra says, "In such a case (breach of the title policy), the proper measure of damages requires consideration of impairment of the value of the lot." This may be calculated by determining the actual value of the lot as if there were no im-

pairments and subtracting the value as impaired; the difference between the two figures is the amount of damages." New Mexico law has never required that a property be sold before its value can be considered in evidence.

The Tenth Circuit's ruling on "prematurity" is incorrect. Hartman vs. U.S. Life & Title, et al., supra begins its decisive discussion as follows, "It is necessary to pass upon *the date which* should be used by the trial court to determine the value of the property." Two rulings are discussed and rejected. The discussion then says, "The remainder of the cases we have found which consider this question hold that the value of the property should be determined as of the *date of discovery of the defects in the title*" (underlining supplied). Overholtzer vs. Northern Counties Title Insurance Co., 116 Cal. App. 2d 113, 253 P2 116, 125 (1953) was cited as being the "best stated" reasoning behind this conclusion. The Tenth Circuit does not follow any of the three rules described in Hartman supra.

John Wilcox vs. Executors of Kemp Plummer, 29 U.S. 106, 7 L Ed 821, 4 Peters 172, says, "When the attorney was chargeable with negligence or unskillfulness, his contract was violated, and the action might have been sustained immediately. Also Buck vs. Mouradian (Florida), 1958, 100 SO2 70.

The Tenth CCA Opinion wrongly makes the cause of action dependent upon the final outcome of a "damages" situation, and not Defendant's breach of duty, in violation of universal law on accrual of a *cause* of action and also New Mexico's law on the same. The dismissal for "Prematurity," lacking any supporting citation and in opposition to established law on the subject, coupled with the lack of due process that would impose the hardship of starting all over again, is interpreted by the Petitioner as a "discrimination" against her in violation of her rights under the New Mexico Equal Rights Amendment, Article II, Section 18. Mrs. Hurley sadly recognizes that she is being discriminated against by the language in the Opinion, which depersonalizes her, culminating in the analogy that

she was not a married woman under New Mexico law, but like unto a guarantor on a note for which there has been no default.

THE OPINIONS REPRESENT AN UNCONSTITUTIONAL FEDERAL JUDICIARY CONTROL OVER PRIVATE LANDS IN THE STATE OF NEW MEXICO.

This case is viewed as an unconstitutional wrong against a Constitutional "person" and is treated as such elsewhere herein. It also can be viewed as a "land" case, an in rem situation. New Mexico land has a landowner, Mrs. Hurley. All the incidents of ownership, including remedies, for the enjoyment of the rights of land ownership are under New Mexico sovereignty. State control over priavte land within its boundaries is so old and well established by Constitutional decision, that this State's right may be overlooked. The Opinions of the U.S. District Court and Tenth Circuit are viewed as a conflict with State established rights. Fundamentally, it conflicts with Amendment X, U.S. Constitution. In 1877, this Court in U.S. vs. Fox, 94 U.S. 315, 24 L Ed 192, said, "The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent . . . is undoubted. It is an established principle of law, everywhere recognized, . . . that the disposition of immovable property, whether by deed, descent or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. McCormick vs. Sullivant, 10 Wheat., 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether inter vivos or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State." The Tenth Circuit, by denying relief to Mrs. Hurley, also affected the

land itself and state laws on ownership. The Opinion cites New Mexico law of Community Property, Section 40-3-12, which, by operation of law, determined ownership of private land in New Mexico, but then would not apply remedies for false statements of title recorded in New Mexico's official records. This was an unconstitutional interference with State remedies for land problems by refusing to act.

CONCLUSION

For the foregoing reasons, petitioners pray for certiorari to be granted.

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Attorney for Petitioners

APPENDIX

Ex. 1

COMMONWEALTH LAND TITLE INSURANCE COMPANY
Philadelphia, Pennsylvania

POLICY OF TITLE INSURANCE

Policy Number 01-319343
File No. GF# 2245 tq

SCHEDULE A

Amount of Insurance: $131,000.00

Premium: $658.30

Date of Policy: 13th day of December, 1977, at 3:21 PM.

1. Name of Insured: LLOYD A. HURLEY, a married man, as his sole and separate estate
2. The estate or interest in the land described herein and which is covered by this policy is fee simple and is at Date of Policy vested in: LLOYD A. HURLEY, a married man, as his sole and separate estate
3. The land referred to in this policy is described in the said instrument, is situated in the County of Bernalillo, State of New Mexico, and is identified as follows:

SCHEDULE B

This policy does not insure against loss or damage by reason of the following:

GENERAL EXCEPTIONS:

1. Rights or claims of parties in possession not shown by the public records.
2. Easements, or claims of easements, not shown by the public records.

3. Encroachments, overlaps, conflicts in boundary lines, shortages in area, or other matters which would be disclosed by an accurate survey and inspection of the premises.

4. Any lien, claim or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records.

5. Community property, dower, curtesy, survivorship, or homestead rights, if any, of any spouse of the insured.

6. Any titles or rights asserted by anyone including, but not limited to, persons, corportations, governments, or other entities, to lands comprising the shores or bottoms of navigable streams, lakes, or land beyond the line of the harbor or bulkhead lines established or changed by the United States Government.

7. Unpatented mining claims; reservations or exceptions in patents or in acts authorizing the issuance thereof; water rights, claims or title to water.

8. Taxes or assessments which are not shown as existing liens by the public record.

SPECIAL EXCEPTIONS:

9. Taxes for the year 1978, and thereafter.

10. Easements recorded of record.

11. Any and all rights, liens, claims, or equities in favor of the Middle Rio Grande Conservancy District, which may affect the insured premises.

12. MORTGAGE executed by LLOYD A. HURLEY, a married man, as his sole and separate estate, to FIRST NATIONAL BANK IN ALBUQUERQUE, dated December 13, 1977, filed for record December 13, 1977 at 3:21 P.M., as Document No. 77-77465, records of Bernalillo County, New Mexico, securing the sum of $130,000.00.

OWNER'S POLICY OF TITLE INSURANCE

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS CONTAINED IN SCHEDULE B AND THE PROVISIONS OF THE CONDITIONS AND STIPULATIONS HEREOF, COMMONWEALTH LAND TITLE INSURANCE COMPANY, a Pennsylvania corporation, herein called the company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the amount of insurance stated in Schedule A, and cost, attorneys' fees and expenses which the Company may become obligated to pay hereunder, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested otherwise than as stated therein;
2. Any defect in or lien or encumbrance on such title;
3. Lack of a right of access to and from the land; or
4. Unmarketability of such title.

EXCERPTS FROM TITLE COMPANY'S BRIEF AND LOWER COURT'S OPINION

Plaintiff has failed to allege the existence of privity of contract between her and any of the parties to the insurance contract. The only privity which could possibly exist under the allegations of the complaint would be by virtue of the marital relationship between Plaintiff and Dr. Hurley and any rights of Plaintiff arising thereby are specifically excepted from coverage under the policy.

Therefore, since Plaintiff is neither a named insured nor a third-party beneficiary of the insurance contract she cannot recover for its alleged breach.

Taken from defendant's brief in support of motion to dismiss amended complaint.

We submit that Defendant owes no duty to Plaintiff, who was not a party to the real estate transaction, was

not a named insured under either title policy issued, whose interest was expressly and specifically excluded from coverage under the owner's policy and who supplied no consideration for the policy premiums.

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a party to the real estate transaction (R. 32-55), was not a named insured under either title insurance policy which was issued (R. 44, 50), and supplied no consideration for the policy premiums (R. 42, 43). Most importantly, Plaintiff's interest and rights were expressly and specifically excluded from coverage under the owner's policy of title insurance issued to her husband. Schedule B of the owner's policy (R. 47) states in pertinent part:

> This policy does not insure against loss or damage by reasons of the following:
>
> General Exceptions:
>
> • • •
>
> 5. Community property, dower, courtesy, survivorship, or homestead rights, if any, of any spouse of the insured.

Plaintiff's interest was not unforseen. On the contrary, spousal community property rights were forseen by the Defendant and expressly excluded from coverage under the terms of the owner's policy. It cannot be seriously argued that any information supplied by Defendant or any duty undertaken by Defendant in the subject transaction was intended for the guidance of Plaintiff or to benefit her in any way, when her interests were expressly excluded by Defendant's policy. Therefore, Defendant owed Plaintiff no duty in connection with the subject real estate transaction and any alleged misstatements contained in the title policies, deed and mortgage, and the fact that Defendant did not disclose the transaction to Plaintiff, creates no liability for negligence, fraud or negligent misrepresentation.

Plaintiff argues in Point IV of her Brief in Chief that the District Court dismissed her negligence claims since it found there was no privity between Plaintiff and Defendant. We agree that the requirement of privity has been abolished in New Mexico actions for negligence by words. *Stotlar* v. *Hester*, 92 N.M. 26, 582 P.2d 403 1978). However, we strongly disagree that the District Court dismissed Plaintiff's negligence claim for lack of privity. The District Court's discussion of Plaintiff's negligence claim begins at the bottom of page 3 of its Memorandum Opinion (R. 235). The Court did not dismiss the negligence claim because there is no privity between Plaintiff and Defendant. A careful reading of the Court's reasoning reveals that the negligence claim was dismissed for lack of a duty running from Defendant to Plaintiff because the Defendant never intended that its actions benefit the Plaintiff. . . ." The obvious implication to be drawn from the Court's reasoning is that in those cases where a defendant intended its actions to benefit a Plaintiff, a duty would exist, regardless of the lack of privity. However, the District Court found from the undisputed facts in the record that the Defendant herein did not intend its actions to benefit the Plaintiff, and that therefore, there is no duty owed by Defendant to Plaintiff. The

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FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

During the divorce action the deposition of Tommie Garcia, a representative of Defendant was taken. That deposition is part of the record on this appeal. (Rec. 85-137). The following facts were elicited during that deposition: Defendant knew Lloyd Hurley was married (Rec. 95, page 10 of deposition); Defendant knew that without a separate property agreement, Tobruk Stables could not be the separate property of Lloyd Hurley under New Mexico

law (Rec. 114 and 126, pages 29 and 41 of deposition); Defendant did not have any separate property agreement from Plaintiff (Rec. 106 page 21 of deposition); Defendant decided to "go ahead and insure it" as Lloyd Hurley's separate property even though it did not have a separate property agreement from Plaintiff. (Rec. 95, 101, 105 and 125, pages 10, 16, 20 and 40 of deposition).

Most significantly Defendant has admitted that it knew "[l]egally it would not have been his sole and separate estate" (Rec. 114, page 29 of Garcia deposition). Thus Defendant has admitted that it issued a title policy with a false assertion of title, knowing that it was false.

Ex. 4

PORTIONS OF COMPLAINT

22. That prior to and at the time of the execution and delivery of the title insurance policy, the Defendant, through its agents, knew that the land in question was not "the sole and separate estate of Lloyd A. Hurley."

23. That the Defendant, through its agents, knew of the existence of the Plaintiff and her status as the legal wife of Lloyd A. Hurley. Further, the Defendant, through its agents, knew that the Plaintiff had not been given a share in the title to the property purchased and knew that she had not signed the mortgage for which the title insurance policy was issued by the Defendant. Further, Defendant, through its agents, knew that the Plaintiff had not been informed of the fact that property known by Defendant's agents to be community property was being described in the title insurance policy in such a manner as to exclude the Plaintiff herein from the title.

24. That the Defendant, through its agents, knew of the existence of the Plaintiff, Zenobia E. Hurley, and her status as the legal wife of Lloyd A. Hurley. Further, the Defendant knew that the Plaintiff, Zenobia E. Hurley, had not been included in the deed given to Lloyd A. Hurley "as his sole and separate estate." That with this knowledge, the Defendant caused to be executed a title policy in the sum of $131,000.00, stating officially and expressly the title to the property in question at the time of the execution of the deed to Lloyd A. Hurley was "the sole and separate estate of Lloyd A. Hurley." That for this express and written undertaking, the falsity of which was known to the Defendant at the time of execution and which has been admitted by its representatives since that time to have been false, the Defendant Title Company is liable.

25. That the Defendant Title Company charged and received premiums for the execution of this false title insurance assertion as to title.

26. That at the time that the Defendant issued a mortgage policy in the sum of $131,000.00 on the same property, it guaranteed the title to said property to be in fee simple as the sole and separate estate of Lloyd A. Hurley, a married man. That the Defendant knew, through its agents, at the time of execution and thereafter that the property in question was not "the sole and separate property of Lloyd A. Hurley." That the express indication of its entire nationally advertised program was its capacity and willingness to respond for misstatement of title.

27. That by issuing false assertions of title, the Defendant cooperated in a pollution of the true status of the title and thereby permitted, authorized and cooperated in a slander of the title to the property described herein.

28. That regardless of how the mortgage described above effected the Plaintiff's interest in the property, the Defendant knowingly cooperated in the imposition of a lien, pseudo or otherwise, and thereby has wrongfully cast a cloud upon property belonging to the Plaintiff and has forced her to take action to remedy the injustice and falsehood occurring by virtue of the false declarations contained in the title policies. A copy of the title insurance policy on the mortgage is attached hereto as Exhibit 3. That the owner's policy of title insurance in the sum of $131,000.00, issued to Lloyd A. Hurley, also duplicates the falsehood by describing the same property as being the sole and separate estate of Lloyd A. Hurley, a married man.

30. That the promises contained in the policy were directed to and for the benefit of the Plaintiff herein since she was a member of the community and had become an owner of the property in question upon the execution of the deed covering the property in question.

31. That the grantors of title referred to in the above policy wrongfully described the property in question as not belonging to the Plaintiff herein.

32. That the wrongful assertions as to ownership knowingly made breached the contract as to the Plaintiff herein.

COUNT II

1. That the allegations of Count I are incorporated by reference herein.

2. That the wrongful statements of title contained in Defendant's policies were negligent and reckless as to the Plaintiff herein as a member of the marital community and likewise constitute a tortous act as to the community.

A hare-raising story

In 1978 Volkswagen opened an automobile plant in southwestern Pennsylvania. The $250 million facility—one of the largest industrial projects in the state's history—is expected to produce 200,000 Volkswagen Rabbits a year.

Providing title insurance services on a project of this magnitude required a company with vast experience and great financial strength. Commonwealth Land was chosen.

It's one more reason why we've become a leader in the title insurance industry. In the last ten years our assets have doubled to more than $60 million.

When you want the best title insurance service, call your local Commonwealth Land office. We'll hop to it.

COMMONWEALTH LAND
TITLE INSURANCE COMPANY

Headquarters: 1510 Walnut Street, Philadelphia, PA 19102
(215) [illegible]

EXHIBIT 1

Ex. 5

MEMORANDUM OPINION

Filed March 23, 1979

The plaintiff, Zenobia A. Hurley, is married to Dr. Lloyd A. Hurley. On December 13, 1977, Dr. Hurley purchased a parcel of real estate receiving a warranty deed designating him, as a "married man trading in his sole and separate estate," as grantee. The day following the purchase, Dr. Hurley petitioned for the dissolution of his marriage to the plaintiff. In connection with the purchase of the property, Dr. Hurley received an owner's title insurance policy issued by the defendant, Commonwealth Land Title Insurance Company. The policy listed "Lloyd A. Hurley, a married man, as his sole and separate estate" as the fee owner of the parcel. Commonwealth also issued a mortgage policy to the First National Bank of Albuquerque which also listed "Lloyd A. Hurley, a married man, as his sole and separate estate," as the fee owner of the land. The Hurley divorce proceeding is still pending in the state district court. The plaintiff brings this suit against Commonwealth claiming that it made false assertions as to the title of the real estate and is liable to the plaintiff for damages. Commonwealth moved to dismiss the complaint. Accompanying its motion were several affidavits and matters outside the pleadings. The Court notified both parties that pursuant to rule 12b of the Federal Rules of Civil Procedure it was going to consider the extrinsic matters and treat the motion as one for summary judgment.

The Court, having considered the memoranda filed together with the exhibits and the entire file in this cause, concludes that there are no genuine issues as to any material fact and that defendant is entitled to a judgment as a matter of law.

BREACH OF CONTRACT

Plaintiff is not nominally a party to the contract between Dr. Hurley and Commonwealth. Even if the Court were to assume that plaintiff was a third-party beneficiary to the contract, she would not be entitled to any recovery. A title insurance policy is a policy of indemnification and not one that guarantees the title of the real estate. *Diversified Mortg. Investors v. U.S. Life Ins. Co. of New York*, 544 F.2d 571 (2nd Cir. 1976); 13 *Couch on Insurance* 2d § 48: 108 at 582 (1965). The insurance policy entitles the insured to indemnity only to the extent that he sustains a loss that is covered by the policy. The Commonwealth policy does not guarantee that fee title is vested in Dr. Hurley, as his separate property. The only loss alleged by the plaintiff was that the title policy stated that title was vested in Dr. Hurley as his separate property when in fact the property was community property. If the land is determined to be community property, then Mrs. Hurley has a half interest in that land. It is hard to see how she is injured even if it is determined that the property is community property. Even if there were some injury, the title policy explicitly excludes loss or damage by reason "of community property . . . rights . . . of any spouse of the insured." It is therefore concluded that as a matter of law plaintiff is not entitled to recover for breach of contract.

SLANDER OF TITLE

Plaintiff alleges that defendant's issuance of the title policy which indicated that the property was owned by Dr. Hurley as his separate property, slandered her interest in the property. Under New Mexico law a plaintiff must show specifically how his interest in property was injured, or in other words the plaintiff must plead and prove special damages in order to recover. *Garver v. Public Service Company of New Mexico*, 77 N.M. 262, 421 P.2d 788 (1966). Rule 9 (g) of the Federal Rules of Civil Procedure requires

that items of specific damages must be specifically stated. "Where special damage must be alleged before a cause of action can be stated, the courts require a good deal of particularity, especially in the slander and libel cases; the complaint must set forth precisely in what way the special damage resulted from the spoken or written words; it is not sufficient to allege generally that the plaintiff has suffered special damages, or that the party has been put to great cost and expense." 2A *Moore's Federal Practice* ¶ 9.08 p. 1974. *See also Korry v. International Tel. & Tel,* 444 F. Supp. 193 (S.D. N.Y. 1978); *Johnson v. American Mutual Liability Insurance Co.,* 335 F.Supp. 390 (W.D. Mo. 1971). Plaintiff's complaint fails to allege any special damages, instead she claims general damages under several theories. Absent an allegation of special damages, plaintiff's complaint fails to state a claim upon which relief can be granted.

FRAUD AND NEGLIGENT MISREPRESENTATION

Plaintiff maintains that defendant fraudulently or negligently and recklessly issued the title policy which wrongfully stated that the property was held by Dr. Hurley as his separate property. To recover under either a fraud or negligent misrepresentation theory, plaintiff must allege and prove that she relied on the misrepresentation. *Sauter v. St. Michael's College,* 70 N.M. 380, 374 P.2d 134 (1962); *Neff v. Bud Lewis Company,* 89 N.M. 145, 548 P.2d 107 (Ct. App. 1976). Plaintiff has made no allegation that she relied on the purported misrepresentation. Absent such an allegation the plaintiff is not entitled to recovery on these theories.

A separate order will be entered granting defendant's motion.

[Signature illegible]
United States District Judge

Ex. 6

MEMORANDUM OPINION

Filed August 22, 1979

This matter comes on for consideration upon the Motion of the defendant to dismiss the plaintiff's amended complaint. On July 6, 1979 the Court notified the parties that the Motion would be treated as one for summary judgment and afforded an opportunity to file additional affidavits or exhibits. The Court has considered the memoranda filed, together with the exhibits, affidavits and the entire file in this cause including the plaintiff's affidavit and exhibit filed on August 20, 1979, and concludes that the Motion is well taken.

The plaintiff Zenobia Hurley brings this action seeking damages for negligence, fraud, negligent misrepresentation and slander of title against the defendant Commonwealth Land Title Insurance Co. in connection with the purchase by her now former husband Dr. Hurley of a property known as Tobruk Stables. Dr. Hurley purchased the property just one day prior to filing for a divorce from the plaintiff, and it was the defendant who issued the title insurance policy on the property and listed "Lloyd A. Hurley, a married man, as his sole and separate estate" as the fee owner. When this action was filed, the plaintiff and Dr. Hurley were still married. However, they are now divorced, and during the divorce proceedings Tobruk Stables was found to be a community property, the mortgage on it was found to be a community debt, and Dr. Hurley has been ordered to sell it as soon as possible, and to distribute half the proceeds to the plaintiff. Despite this fact, the plaintiff has pursued her action here.

The defendant filed a Motion to dismiss based on the original complaint which the Court granted in part and denied in part in its Memorandum Opinion dated March 23, 1979. The Court found that the contract claim alleged by the plaintiff was not valid, and granted the defendant's

Motion in this respect. With regard to the fraud and negligent misrepresentation claims, the Court found that the allegations of the plaintiff as regards reliance on her part were missing and ordered the plaintiff to amend her complaint if she desired to pursue these theories of recovery. Additionally, the Court ordered the plaintiff to amend her complaint so as to allege special damages if she intended pursuing her slander of title claim.

The plaintiff did amend her complaint and it is the defendant's Motion to dismiss this amended complaint which is now before the Court. The defendant moves to dismiss the negligence claim on the grounds that the defendant owed no duty to the plaintiff. It moves to dismiss the fraud and negligent misrepresentation claims on the grounds that no reliance has yet been alleged by the plaintiff and also that she suffered no damage. With regard to the slander of title claim, the defendant claims that the plaintiff has failed to allege that the defendant acted with any malice.

With regard to the claims of the plaintiff for fraud and negligent misrepresentation, the Court finds that these should be dismissed. The alleged misrepresentation of the defendant was the issuing of a title insurance policy and deed in the name of Dr. Hurley "as his sole and separate property" when in fact the property belonged to the community and the deed and mortgage should have reflected community title. At the time of the transaction, the plaintiff was completely uninformed that her husband was purchasing the Tobruk Stables, and she knew nothing of the details of the legal title. She has not alleged in her original complaint nor in her amended complaint in what way she acted or refrained from acting in reliance on the title company's alleged misrepresentation. Indeed, it would be difficult to ever alleged such as she was completely ignorant of the matter at the time it occurred.

The plaintiff alleges that she relied on the defendant having to give notice of real estate transactions, but this

is unrelated to the alleged title misrepresentation, and it is undisputed that the deed and mortgage were properly recorded in the Bernalillo County Clerk's Office. In this respect there was no concealment of the fact that Dr. Hurley was taking title to the property as his "sole and separate property." Because the plaintiff has alleged no facts indicating any reliance by her on the title representations of the defendant, nor any facts indicating a change in her position as a result of her reliance on the title representations, her complaint must be dismissed insofar as it purports to state a claim for fraud or negligent misrepresentation.

The slander of title claim must also be dismissed as the plaintiff has failed to allege any facts indicating that the defendant acted with any malice, as is required by New Mexico law, *City of Hobbs v. Chesport, Ltd.*, 76 N.M. 609 (1966). The most that can be said is that the plaintiff has alleged intentional conduct, but that is not sufficient to make a claim for malice. For these reasons, the slander of title claim must be dismissed.

Finally, the negligence claim of the plaintiff must be dismissed also. There is no case law in New Mexico on the question of whether a title insurance company is liable for negligence to a third party not in privity with it. However, in jurisdictions which have considered the issue, the rule has developed that liability will be found where the interests of the third party are known to the defendant at the time of the transaction, and the information supplied by it is intended to benefit the third party. *Anderson v. Boone County Abstract Co.*, 418 S.W.2d 123 (Mo. 1967); *Chun v. Park*, 462 P.2d 905 (Haw. 1969); *Rozny v. Marnul*, 250 N.E.2d 656 (Ill. 1969), and cases cited therein. This case does not come within this limited exception for the reason that the defendant never intended that its actions benefit the plaintiff, as is evident from the specific contract clause excluding any liability

for damage by reason "of community property . . . rights . . . of any spouse of the insured." While the New Mexico legislature has seen fit to rquire abstractors to be bonded "for the use and benefit of *any person* who shall sustain any loss or damage by reason . . ." of the defendant's actions, Section 47-4-2, *N.M. Stat. Ann.* (1978), and the Supreme Court of New Mexico has recognized the obligation, *Gallegos v. Ortiz*, 28 N.M. 598 (1923), this is not a suit under the bond or against the surety. Therefore, this statute is not relevant and absent any other basis for liability to the plaintiff, the defendant's Motion to dismiss must be granted.

An Order will be entered in accordance herewith.

/s/ Howard ?? ??
United States District Judge

Ex. 7

WARRANTY DEED

TOBRUK STABLES, INC., a New Mexico corporation, for consideration paid, grant to LLOYD A. HUBLEY, M.D., a married man trading in his sole and separate estate, whose address is * * *, the following described real estate in Bernalillo County, New Mexico:

Ex. 8

DEPOSITION OF TOMMIE GARCIA

[21] Q. Let me be sure now to ask you specifically. Dr. Hurley had never indicated to you or anybody in your presence that there had been in existence any kind of separate property agreement between him and Mrs. Hurley about any property and

* * * * * * * * * *

[29] Q. I think we have the benefit of your thinking on it, but did you discuss this thinking, or did anybody else discuss this thinking with you in your organization?

A. No, sir.

Q. As I understand it, if the mortgage had not intervened, you would have gone ahead and issued the policy to Dr. Hurley guaranteeing clear title to him as his sole and separate estate?

A. As a married man.

Q. As a married man.

A. Yes.

Q. Since you deal with titles and things like that, how did you come to the conclusion that legally it would be his sole and separate estate?

A. Legally it would not have been his sole and separate estate.

Ex. 12

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 79-1954

ZENOBIA E. HURLEY, *Plaintiff-Appellant*,

v.

COMMONWEALTH LAND TITLE INSURANCE COMPANY,
Defendant-Appellee.

Eugene E. Klecan of Klecan & Roach, P.A., Albuquerque, N. M., for plaintiff-appellant (Janet Santillanes of Klecan & Roach, P.A., Albuquerque, N. M., with him on the brief), for plaintiff-appellant.

Leonard G. Espinosa of Moses, Dunn, Beckley, Espinosa & Tuthill, Albuquerque, N. M., for defendant-appellee.

Before SETH, Chief Judge, DOYLE, Circuit Judge and THOMPSON, District Judge.*

RALPH G. THOMPSON, District Judge.

Plaintiff commenced this diversity action seeking to recover damages allegedly resulting from defendant's issuance of a policy of title insurance. The trial court treated the defendant's Motion to Dismiss as a Motion for Summary Judgment and granted summary judgment in favor of the defendant. Plaintiff now seeks review of the summary judgment entered aganist her.

Plaintiff's Amended Complaint before the trial court alleged six counts upon which plaintiff sought to impose liability on the defendant. The legal theories advanced by plaintiff were estoppel, slander of title, fraud, negligent

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* Honorable Ralph G. Thompson, United States District Judge for the Western District of Oklahoma, sitting by designation.

misrepresentation, false advertising, and negligence. The undisputed facts of this action are as follows: On December 13, 1977, Dr. Lloyd Hurley purchased commercial property known as Tobruk Stables. This purchase was undertaken without the knowledge of, or notice to, his wife Zenobia Hurley, the plaintiff and appellant herein. To consummate the purchase transaction Dr. Hurley secured a loan from the First National Bank in Albuquerque and gave the bank a mortgage upon the property in return. Dr. Hurley did not obtain a separate property agreement from his wife even though he conducted the transaction as "a married man trading in his sole and separate estate." As a part of the transaction, Commonwealth Title Insurance Company issued a policy of title insurance which described the estate acquired by Dr. Hurley as being fee simple vested in "Lloyd A. Hurley, a married man, as his sole and separate estate." The next day, December 14, 1977, Dr. Hurley filed for divorce. In the divorce proceedings it was determined that title to the commercial property was vested in the community and the mortgage given by Dr. Hurley was a community obligation. This determination is presently on appeal to the Supreme Court of New Mexico.

If the Supreme Court of New Mexico ultimately determines that Tobruk Stables is the separate property of Dr. Hurley and not a part of the community property, the plaintiff will have no interest therein, N.M. S.A. (1978) § 40-3-3, and no obligation on the mortgage, *Atlas Corporation v. De Villiers*, 447 F.2d 799 (10th Cir. 1971). The result of such a determination would be that the plaintiff could not possibly have been harmed by the defendant's acts. Thus, the remainder of the Court's opinion assumes, for the take of argument, that Tobruk Stables is community property.

While plaintiff has advanced several different legal theories in support of her claim, the gist of her action is that she has incurred liability upon a purchase money mortgage for the sole reason that the defendant issued a

policy of title insurance covering the fee simple estate to Tobruk Stables vested in Lloyd A. Hurley, a married man, as his sole and separate estate when, in fact, the defendant knew the title would vest in the community. The narrow question presented for review here is whether the pleadings, depositions, affidavits, exhibits, and admissions taken together establish the existence of issues of material fact. *Whitfield v. Gangas*, 507 F.2d 880 (10th Cir. 1974). In making this determination, it is necessary to examine the characteristics and circumstances of the purchase money mortgage obligation the plaintiff claims has been imposed upon her.

This obligation is the result of a legal presumption that property acquired during marriage, by either husband or wife, is community property. N.M.S.A. (1978) § 40-3-12. While plaintiff has been judicially determined to be equally responsible for the obligations on Tobruk Stables, an integral part of this determination is that she has been granted a one-half interest therein and the property has been ordered to be sold (R. 193). Additionally, the First National Bank in Albuquerque did not consider the plaintiff's resources in determining the mortgage's risk and did not intend to look at those resources to secure the payment thereof (R. 75). Finally, there is nothing in the record to indicate that the plaintiff has received any demand for payment upon the obligation, that Tobruk Stables has been sold leaving a deficit owed on the mortgage, that the existence of the obligation has impaired plaintiff's ability to obtain credit, or that she has been damaged in any other way as a result of the existence of the mortgage. While there is a factual dispute in the pleadings concerning the actual value of Tobruk Stables, a determination that the outstanding mortgage obligation is either greater than, or less than, the actual value of the property will not materially advance the resolution of the question of whether the plaintiff has actually been damaged. In short, even though the plaintiff has been determined to be legally liable for

the purchase money mortgage, there is nothing in the record to indicate that she has become liable in fact, or otherwise injured. At this point, her situation is somewhat analogous to that of a guarantor on a note upon which there has been no default. Whether the defendant is liable to plaintiff for in some manner causing plaintiff's potential mortgage liability is a question that can not be answered at this time. The pleadings, depositions, affidavits, exhibits, and admissions, when taken together, wholly fail to establish any inference that the plaintiff has suffered, or is currently suffering, any injury as a result of the defendant's allegedly wrongful act. If it were determined that the defendant is liable to plaintiff, the nature and extent of the plaintiff's injuries are incapable of determination at this time. Without finding it necessary to reach the various arguments advanced by the parties concerning duty, reliance, intent and estoppel, it is the conclusions of this Court that the plaintiff's claims are simply not ripe for adjudication.

Accordingly, and for the reasons expressed herein, the trial court's dismissal of this action is hereby

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civ. No. 78-673-B

ZENOBIA E. HUBLEY, *Plaintiff*,

vs.

COMMONWEALTH LAND TITLE INSURANCE COMPANY,
Defendant.

ORDER

Filed August 22, 1979

This matter having come on for consideration upon the Motion of the defendant to dismiss, which is being treated as a Motion for summary judgment, and the Court having filed its Memorandum Opinion herein concluding that the Motion is well taken; Now, Therefore,

IT IS BY THE COURT ORDERED that summary judgment is entered for the defendant and the plaintiff's Motion for summary judgment is denied and this action is dismissed.

/s/ Howard ?? ?? ??
United States District Judge

ANALYSES OF OPINION

The OPINION exposes its pro-husband attitude when it ways that the question of whether Tobruk was community property is pending before the Supreme Court of New Mexico at the time of the OPINION. The Opinion in Hurley v. Hurley 94 N.M. 641, 615, P2 256 came down on June 10, 1980, one year before the Tenth Circuit OPINION herein and the Pacific Reporter had carried that OPINION. Rehearing was denied September 2, 1980. At the time of oral argument in Oklahoma City before the Tenth Circuit panel, on March 18, 1981, the Court was informed of this fact. The OPINION statement, "If the Supreme Court ultimately determines that Tobruk Stables is the separate property of Dr. Hurley and not a part of the community property, the plaintiff will have no interest therein, N.M. S.A. (1978) § 40-3-3," indicate a present desire by the Tenth Circuit that in some long-shot way, the New Mexico Supreme Court will renounce Mrs. Hurley's community claim to Tobruk and reject New Mexico's traditional civil law concept in favor of the common law concept held by all other states in the Tenth Circuit.

In view of New Mexico's Constitutional provisions Article II Section 5 and Article II Section 18, the Tenth Circuit's hope that the community property concept, N.M.S.A. 1978 40-3-12, would be overturned seems futile. The fact that the OPINION cites N.M.S.A. (1978) 40-3-3 in support of its hope is revealing. That section of New Mexico's Community Property law states, "Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling." The foregoing, taken by itself, is a good expression of the common law on husband and wife holdings, which would allow Dr. Hurley to take his money earned as a doctor and buy a stables as his own "sole and separate property" using the deed used herein. There is a possible obstacle even in a common law state because of fraud, but 40-3-3 supra has a different meaning entirely in New Mexico and is only one section of

the Community Property laws. All community property lawyers would cite 40-3-12 because the presumption is absolute that Lloyd A. Hurley, being described as "a married man" acquired community property by the deed.

Ex. 15

MAY TERM—June 8, 1981

Before Honorable Oliver Seth, Honorable William E. Doyle, Circuit Judges, and Honorable Ralph G. Thompson, District Judge.*

No. 79-1954

ZENOBIA E. HURLEY, *Plaintiff-Appellant,*

vs.

COMMONWEALTH LAND TITLE INSURANCE COMPANY, *Defendant-Appellee.*

This matter comes on for consideration of Appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, Clerk

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* Of the Western District of Oklahoma, sitting by designation.

Ex. 17

ORDER

Filed March 23, 1979

This matter coming on for consideration upon the Motion of the defendant Commonwealth Land Title Insurance Company to dismiss and the Court having filed its Memorandum Opinion herein; Now, Therefore,

It Is by the Court Ordered that the Motion of defendant Commonwealth Land Title Insurance Company to Dismiss be, and hereby is, granted and the plaintiff is given fifteen (15) days in which to file an amended complaint or the cause will automatically be dismissed with prejudice.

/s/ Howard ?? ??
United States District Judge

Ex. 18

1. Treaty of Guadalupe Hidalgo (1848), Article VIII:

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please, without their being subjected on this account, to any contribution, tax or charge whatever.

Those who shall prefer to remain in said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty, and those who shall remain in the said territories after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States.

2. Treaty of Guadalupe Hidalgo, Article IX:

Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the pre-

ceding article, shall be incorporated into the union of the United States, and be admitted at the proper time (to be judged of by the congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.